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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 591

VIVIAN WALSH BARRON,

Petitioner,

-versus-

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF FLORIDA,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

Comes now Vivian Walsh Barron, petitioner herein, by and through her undersigned attorney, and respectfully prays that this Honorable Court issue its Writ of Certiorari to review the decision of the District Court of Appeal, Third District of Florida on the 5th day of March, 1968, and the Order of the same Court on the 26th day of March, 1968, denying Petition for Rehearing.

OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal, Third District, was entered on March 5, 1968. It is annexed hereto as Exhibit A and is reported in 207 So.2d 696.

Order denying Petition for Rehearing was entered on March 26, 1968, it is annexed hereto as Exhibit B.

The Supreme Court of Florida denied Petition for a Writ of Certiorari on May 31, 1968. A copy is annexed hereto as Exhibit C. Petition for Rehearing was filed in the Supreme Court of Florida on June 24, 1968. A copy is annexed as Exhibit D.

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, Section 1257 (3) because a title, right, privilege, or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal, Third District, State of Florida and under Rule 19 (A) of the Rules of the Supreme Court of the United States effective October 2, 1967, because a state court has decided a Federal Constitutional question of substance in a way probably not in accordance with applicable decisions of this Court.

QUESTION PRESENTED

I

IN A CONVICTION FOR FORGERY WAS DUE PROCESS OF LAW DENIED WHEN NO PROPER

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* * *

IN THE SUPREME COURT OF THE UNITED STATES

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JURISDICTION

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QUESTION PRESENTED

I

IN A CONVICTION FOR FORGERY WAS DUE PROCESS OF LAW DENIED WHEN NO PROPER

PREDICATE WAS LAID FOR THE INTRODUCTION INTO EVIDENCE OF THE "STANDARDS" USED AS THE BASIS FOR COMPARISON WITH THE DOCUMENTS ALLEGEDLY FORGED.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Constitution of the United States - Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 United States Code - Section 1257 (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes

of, or commission held or authority exercised under, the United States.

Title 28 Revised Rules of the Supreme Court of the United States Rule 19. Considerations governing review on certiorari:

> 1(a) Where a state court has decided a federal question of substance not therefore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Florida Statutes (1967):

Chapter 92.38 - COMPARISON OF DISPUTED WRITINGS

> Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute.

* * * *

STATEMENT OF THE CASE

The State of Florida filed an Information against Vivian Walsh Barron on ten counts of forgery.

She was convicted by a jury on each count.

At the trial handwriting experts testified that the documents alleged to have been forged were,

at least in part, written by her. Since neither they nor anyone else saw her sign the questioned documents personally, standards of comparison were used. Those samples consisted of:

(a) Arrest reports allegedly made by her during the time that she was employed as a police officer.

(b) An application for employment, allegedly signed by her many years before. The testimony reflected the fact that no one had seen her sign or make out the arrest reports and that one witness thought she had seen her make out the application for employment.

The standards were not pleadings in the case, were not admitted as genuine, were not in the record for any purpose except to be used as standards for comparison purposes.

The trial court stated on at least one occasion that the jury could decide the genuineness of the standards.

After conviction, Petitioner appealed to the District Court of Appeal of Florida, Third District. That Court affirmed by the opinion which we seek to have reviewed through these proceedings.

Petition for Writ of Certiorari was filed in the Supreme Court of Florida. That Court denied the Petition.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED UPON IN THE STATE COURTS

The Federal questions presented here was raised as follows:

1. At the trial level, by objection to the introduction into evidence of the reports allegedly signed by Petitioner and to be used as the standards for comparison against the Petitioner to identify her signature; by motion for directed verdict (R-840); by motion for arrest of judgment or in the alternative a new trial (R-860).

2. On appeal, at the District Court of Appeal of Florida, Third District, by Assignments of Error Numbers 3, 5, 6 and 7 (R-872-873).

The Third District Court of Appeal of Florida affirmed the judgment of the trial court, and stated:

> "In this case the appellant was charged with having forged customer return cash vouchers with intent to injury and defraud a named department store. The sample writings submitted by the state for use as standards of comparison to prove that the disputed writings (cash return vouchers) were made by the defendant, consisted of a written application submitted to the store by the defendant in 1960 in seeking employment, and a number of arrest reports made by the

> defendant in 1964 while she was employed as a police officer. Prior to the use of those standards by witnesses for comparison with the disputed writings, evidence was duly submitted regarding their genuineness, on the basis of which the court overruled objection thereto and permitted their use as standards for comparison. On examining the record we find no reason to disturb that ruling of the trial judge. See Annot. 41 A.L.R.2d 575"

The point was again raised in the Supreme Court of Florida, where certiorari was denied on May 31, 1968. Petition for rehearing was denied on June 24, 1968.

REASONS FOR GRANTING THE WRIT

This Honorable Court has consistently held that it is a violation of Constitutional "...due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199 (1960). More recently, that the burden "...is on the State to prove that an accused has committed an act bringing him within a criminal statute." Johnson v. Florida,_____ U.S._____, 20 L.Ed.2d 838 (1968).

It is the Petitioner's contention that the record in the present case is totally devoid of any evidence upon which the trial court or the appellate court could legally predicate a ruling that the handwriting exemplars introduced into evidence were genuine within the meaning of Section 92.38, Florida Statutes. That Section provides:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute."

The pivotal clause in the cited statute is that an exemplar, to be admissible against a defendant, must be "...proved to the satisfaction of the judge to be genuine..." The two exemplars used by the State in the case at bar were (1) arrest reports allegedly made by her while she was employed as a police officer; and, (2) an application for employment allegedly signed by the Petitioner many years before. No one had seen the defendant sign or fill out the arrest reports. One witness thought she had seen the Petitioner complete the application for employment.

In Chemical Corn Exchange Bank and Trust Company v. Frankel, 111 So.2d 99 (Fla.App. 1959), the Third District Court of Appeal, Florida, examined the ways in which a handwriting sample may be admitted into evidence:

> "Our statute has been interpreted to mean that if the specimen signature sought to be used as a basis for comparison with the disputed signature is proved to the satisfaction of the judge to be genuine, it is admissible in evidence as a proper standard upon which testimony of its

> comparison with the disputed signature may be predicated. The genuiness of the standard to be used may be established in any of several ways. If its genuineness is admitted by the parties, this may be accepted by the trial judge, and further proof thereof rendered unnecessary. If, however, the genuineness of the standard is not admitted, it may be used as a basis for comparison if it is in evidence before the court in the case for some other purpose, or forms a part of the pleadings in the case." (111 So.2d 99 at page 101).

In the present case, the genuineness of the exemplars was not admitted by the defendant. The exemplars were not in evidence for some other purpose, nor did they form a part of the pleadings in the present case. To the contrary, the sole purpose of introducing the exemplars was to attempt to identify the Petitioner's handwriting.

In the case at bar, the factual issue of the genuineness of the exemplars was determined by the trial judge. The Petitioner respectfully submits that there was no evidence before the trial judge upon which he could rule that the exemplars represented the handwriting of the Petitioner. The arrest reports and employment application admitted as examples of Petitioner's handwriting were not connected to Petitioner by any evidence.

The Federal Statute at 28 U.S.C. § 1731 (1948), is similar to Florida Statute, Section 92.38, supra. That

statute provides:

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributal to such person." 28 U.S.C. § 1731 (1948).

A reading of the decisions interpreting the above statute discloses that where convictions were upheld, there was competent evidence in the record to substantiate the genuiness of the exemplars. e.g. Straus v. United States, 311 F.2d 926 (5th Cir. 1963).

The gravity of the denial of due process in this case becomes even more pointed when it is realized that the ruling of the trial judge serves as the entire predicate for the testimony of the handwriting expert. Moreover, the issue of handwriting identity was the only question for the jury to resolve.

Accordingly, on this record, the only factual issue submitted for the jury's determination, was predicated upon a totally erroneous ruling by the trial judge. Given this erroneous ruling, a once very weak case becomes a case which appears on its face to be conclusive. The violations of due process in Johnson v. Florida, supra, are repeated in the case sub judice. It is "...a violation of due

process to convict and punish a man without evidence of his guilt." Thompson v. Lousiville, supra. Ergo, in this case, where the entire conviction is based upon unsubstantiated handwriting exemplars, which are the only evidence of guilt. the Petitioner stands convicted in violation of due process of law.

No direct, clear evidence exists that proved she signed the exemplars. This opinion evidence is based on circumstantial evidence.

CONCLUSION

For the reasons stated, the granting of the Writ is urged. The decision of the Court below should be reversed because it affirmed a judgment devoid of evidence against the Petitioner on the only issued tried, in violation of her right to due process.

Respectfully submitted.

_____

***

EXHIBIT A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1968

VIVIAN WALSH BARRON, Appellant, ** vs. ** CASE NO. 66-936 THE STATE OF FLORIDA, Appellee. **

Opinion filed March 5, 1968.

An Appeal from the Criminal Court of Record for Dade County, Jack A. Falk, Judge.

Norman Francis Haft, for appellant.

Earl Faircloth, Attorney General and Jesse J. McCrary, Jr., Assistant Attorney General, for appellee.

Before CHARLES CARROLL, C.J., and PEARSON and HENDRY, JJ.

CHARLES CARROLL, Chief Judge.

The appellant was convicted on ten counts on an information charging forgery, for which concurrent sentences were imposed. He seeks reversal on three grounds.

Appellant's first contention is that the court committed error by permitting use of samples of her handwriting for comparison with the disputed handwritings, on the basis of evidence presented as to the genuineness of the samples, because their genuineness had not been admitted by the defendant and because the samples were not a part of the pleadings and were not in evidence for some other purpose. In support thereof the appellant relies on Brantley v. State, 84 Fla. 649, 94 So. 678; Thompson v. Freeman, 111 Fla. 433, 149 So. 740; and Chemical Corn Exchange Bank & Trust Co. v. Frankel, Fla.App. 1959, 111 So.2d 99, 72 A.L.R.2d 1270.

In modification of the common law rule against such comparison of writings or signatures, the legislature enacted an enabling statute (Laws of Florida 1861, Ch.1096, § 55, which as carried forward now appears as § 92.38 Fla. Stat., F.S.A.), reading as follows:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings, and the evidence of

witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute."

In order to give effect to the statute, and at the same time give due recognition and effect to those prior decisions, we consider the rule relating to comparison of a disputed writing with a writing offered as a standard for comparison, to be that the statutory requirement that genuineness of a sample offered for comparison must be "proved to the satisfaction of the judge" can be met by evidentiary proof presented to the judge, or by admission of its genuineness by the parties in the pleadings or before the court, or when it is in evidence before the court in the case for some other purpose.

Accordingly, we reject as unsound the appellant's contention that the genuineness of a sample writing intended for use as a standard for comparison with a disputed writing involved in the case can not be established by evidence presented to the judge. To so hold would be contrary to the statute and would detract materially from its usefulness.

In this case the appellant was charged with having forged customer return cash vouchers with intent to injure and defraud a named department store. The sample writings submitted by the state for use as standards of comparison to prove that the disputed writings (cash return vouchers) were made by the defendant, consisted of a written application submitted to the store by the defendant in 1960 in seeking employment, and a number of arrest reports made by the defendant in 1964 while she was employed as a police officer. Prior to the use of those standards by witnesses for comparison with the disputed writings, evidence was duly submitted regarding their genuineness, on the basis of which the court overruled objection thereto and permitted their use as standards for comparison. On examining the record we find no reason to disturb that ruling of the trial judge. See Annot. 41 A.L.R.2d 575.

We have considered the remaining contentions of the appellant in the light of the record and briefs and find them to be without merit.

No reversible error having been made to appear, the judgment appealed from is affirmed.

Affirmed.

EXHIBIT B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1968

TUESDAY, MARCH 26, 1968

VIVIAN WALSH BARRON, **

Appellant, **

vs. ** CASE NO. 66-936

THE STATE OF FLORIDA, **

Appellee. **

**

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

s/ William P. Carter
Clerk District Court of
Appeal, Third District

cc. Norman Francis Haft
Jesse J. McCrary, Jr.
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

* * *

EXHIBIT C

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

FRIDAY, MAY 31, 1968

VIVIAN WALSH BARRON,	**	
Petitioner,	**	
vs.	**	CASE NO. 37,284
THE STATE OF FLORIDA,	**	DISTRICT COURT OF APPEAL, THIRD DISTRICT
Respondent.	**	
	**	
	**	

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional

briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

s/ Sid J. White
Sid J. White
Clerk Supreme Court.

cc. Hon. W. P. Carter
Hon. J. F. McCracken
Hon. Milton E. Grusmark
Hon. Jesse J. McCrary, Jr.

* * *

EXHIBIT D

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1968

MONDAY, JUNE 24, A.D. 1968

VIVIAN WALSH BARRON, **

Petitioner **

vs. ** CASE NO. 37,284

STATE OF FLORIDA, **

Respondent **

On Consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A true copy,

TEST:

s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF MAY 31, 1968 IN THE ABOVE CAUSE)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

VIVIAN WALSH BARRON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida

EDWARD D. COWART
Assistant Attorney General
State of Florida

JESSE J. McCRARY, JR.
Assistant Attorney General
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

VIVIAN WALSH BARRON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 207 So.2d 696, (3rd D.C.A. Fla. 1968). Order denying Petition for Rehearing was entered on March 26, 1968, said order is annexed hereto as Exhibit A

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The State respectfully rephrases the Question Presented as stated by the petitioner to read as follows:

> WHETHER THERE IS A DENIAL OF DUE PROCESS IN A CONVICTION FOR FORGERY WHERE THE "STANDARDS" FOR COMPARISON USED ARE PROVED TO BE THE HANDWRITING OF THE DEFENDANT TO THE SATISFACTION OF THE TRIAL COURT?

STATEMENT OF THE CASE

On November 24, 1965, ten informations were filed charging the petitioner with forgery. (R. 773-784). On January 17, 1966, the petitioner filed motions for discovery and to quash the informations. (R. 797-803). On January 24, 1966, the motion to quash was granted and on that day, new informations were filed. (R. 805-827). On the same day, the petitioner was arraigned, waived trial by jury and pled not guilty. (R. 804).

On February 23, 1966, petitioner withdrew her waiver of jury trial. (R. 829). The trial court further granted certain motions for discovery. (R. 830-832). Trial was had between September 19th and 23rd, 1966 and petitioner was found guilty. (R. 1-772). On September 23rd, 1966, petitioner was sentenced to five (5) years in the State Penitentiary. (R. 857-859).

During the trial, a handwriting expert testified concerning certain analyses he made. (R. 481-568). Objections were made to the standards used and the failure of the State to provide a copy of his analyses.

REASONS FOR NOT GRANTING THE WRIT

The instant petition filed in this cause does not pass upon a federal question. In effect, there has not been a denial of due process and therefore the petition before this court should be summarily denied.

It is the contention of the respondent that the record and the decision of the lower court is replete with evidence of due process and eminently correct. The petition raises only an evidentiary question which rested within the sound discretion of the trial judge.

The Third District Court of Appeal has followed the established standards of Florida Law, the constitutionality of which petitioner questions not.

The issue raised must be considered in the following context. Certain instruments were forged but there were not witnesses to the forgery. Evidence established that the accused had signed certain documents; i.e., the genuineness of petitioner's signature on the documents—standards for comparison—was proved. Is the State precluded from using these standards as a basis for expert witnesses' testimony as to whether the accused committed the forgery?

At the common law, the comparison of writing was "considered too uncertain to be accepted as trustworthy evidence in matters involving disputed signatures or writings." *Chemical Corn Exchange Bank & Trust Co. v. Frankel*, 111 So.2d 99, 101, (3rd D.C.A., Fla. 1959).

In the interest of promoting the administration of justice, this harsh rule of the common law was abolished by enactment of what is now § 92.39, Fla. Stat. (1955). Ibid. The Statute provides:

> "Comparison of a disputed writing with any writing proved to be to the satisfaction of the judge to be genuine, shall be permitted to be made by the witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the jury, or to the court in case of a trial by the court, as evidence of the genuineness, or otherwise, of the writing in dispute."

The aforementioned Statute of Florida complies basically with the Federal Statute related to the same area.

28 U.S.C., § 1731 provides:

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

It should be noted that the common law rule did not permit a comparison of handwriting unless the writing to be compared was properly in the case for other purposes than were comparison. *Maxey v. United States*, 207 F. 327, 125 C.C.A. 77 (Ark. 1913).

The Federal cases as in Florida changed this rule. See, *Smythe v. New Providence Tp.*, 263 F. 481, (C.C.A. N.J. 1920) *Short v. United States*, 221 F. 248, 248 C.C.A. 104 (Minn. 1915).

Additionally, respondent would point out that § 613 of 32 C.J.S. which deals with the limitation upon the admission of standards, is titled "Rule in Absence of Statute". In C.J.S., *Evidence*, § 614 (1964), the authors note that under Statutes, standards which are genuine may be admitted into evidence for comparison whether or not they are otherwise relevant or material to the issues. And in 20 Am. Jur., *Evidence*, § § 744-45, it is stated that where a signature is in dispute the modern trend and great weight of authority permits the admission of otherwise irrelevant documents solely for purposes of comparison if they bear the genuine signature of the person who allegedly signed the writing in dispute. See, *Hickory v. United States*, 151 U.S. 303, 38 L.Ed. 170, 14 S.Ct. 334, (1893).

A comparable situation was decided in the case of *Easterday v. United States*, 292 F. 664, 53 App. D.C. 387, (1923), certiorari denied, 44 S.Ct. 181, 263 U.S. 719, 68 L.Ed. 523, (1924). In *Easterday*, supra, the appellant forged certain checks on a company where he was the treasurer of a certain candy company. One J.F. Jack was at one time treasurer of the candy company but was not the treasurer at the time the checks were drawn. However, his name was forged to the checks. The checks were endorsed by the appellant as the current treasurer of the candy company. The Court, in deciding the issue stated the following:

> "There being ample testimony tending to show that Jack's name on check 'B' was forged by the defendant, checks A and C were then received in evidence, so that the jury might compare the handwriting in which his name appeared on them with that in which it appeared on check B, for the purpose of determining whether or not it was the work of the same person. In this there was no error. . ."

The allegation that there has been a denial of due process is totally without merit. Few, if any, federal courts have held that due process was not afforded under similar factual patterns. In *Dean v. United States*, 246 F. 568, C.C.A. Ga. (1917) the court was faced with a like problem as the petitioner here. In *Dean*, supra, the defendant was charged with altering a postal money order. The "standard" for comparison was a notebook containing personal memoranda, taken from the accused's possession. The Court in its wisdom had the following to say:

> "There was no evidence of the identity of the writer of the entries, other than the character of the book and the fact that it came from the person of the defendant... *When the book containing the entries is a personal memorandum book, such as the owner customarily keeps in his own handwriting, such as a diary or an order book, or a memorandum of a personal itinerary, we think the character of the book and the custom of the owner of such a book to write the entries in it himself circumstances sufficient to go to a jury, and from which they may infer, if satisfied of it, that the owner or possessor of the book made the entries in it.*" (Emphasis added).

A fortiori, it follows that the arrest records petitioner signed were of that class of documents petitioner would ordinarily sign while employed by the City of Miami, Police Department. This fact has not been contested at any stage during the litigation of this cause.

Further, the application for employment is the type of document that an individual would be expected to personally sign. Compare *Dean v. United States*, supra.

It is respectfully submitted that the exemplars used were proved to the satisfaction of the trial judge. The existing law was followed and the petitioner was not denied due process of law in any way.

CONCLUSION

The respondent submits that there was no federal question involved; moreover if this Honorable Court finds that a federal question was presented, the petition for the Writ of Certiorari should be denied since there is no showing of an abridgement of the petitioner's constitutional rights.

Respectfully submitted,

EARL FAIRCLOTH,
Attorney General
State of Florida.

EDWARD COWART
Assistant Attorney General
State of Florida

JESSE J. McCRARY, JR.
Assistant Attorney General
State of Florida

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. _____
VIVIAN WALSH BARRON,
Petitioner,
vs.
THE STATE OF FLORIDA,
Respondent.

COUNTY OF DADE : SS
STATE OF FLORIDA :

AFFIDAVIT OF SERVICE

I, JESSE J. McCRARY, JR., Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief for the Respondent to the Supreme Court of the United States was served upon HONORABLE MILTON E. GRUSMARK, Attorney for Petitioner, 1674 Meridian Avenue, Suite 311, Miami Beach, Florida 33139, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 23rd day of October, 1968.

JESSE J. McCRARY, JR.
Assistant Attorney General

Sworn to and subscribed before me
at Miami, Dade County, Florida,
this _____ day of October, 1968.

NOTARY PUBLIC
State of Florida at Large
My Commission Expires:

APPENDIX

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

TUESDAY, MARCH 26, 1968

CASE NO. 66-936

VIVIAN WALSH BARRON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

s/ William P. Carter
Clerk, District Court of
Appeal, Third District

cc: Norman Francis Haft
Jesse J. McCrary, Jr.
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

* * * *

EXHIBIT B

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1968

FRIDAY, MAY 31, 1968

DISTRICT COURT OF APPEAL, THIRD DISTRICT

CASE NO. 37,284

VIVIAN WALSH BARRON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

ATTEST:

s/ Sid J. White
Sid J. White
Clerk Supreme Court.

cc: Hon. W. P. Carter
Hon. J. F. McCracken
Hon. Milton E. Grusmark
Hon. Jesse J. McCrary, Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 591

VIVIAN WALSH BARRON, Petitioner,

vs.

THE STATE OF FLORIDA, Respondent.

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MILTON E. GRUSMARK
Attorney for Petitioner
1674 Meridian Avenue
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 591

VIVIAN WALSH BARRON, Petitioner,

vs.

THE STATE OF FLORIDA, Respondent.

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed in reply to the brief filed for the Respondent.

ARGUMENT

The key to the difference between the positions of the parties is best found in the language in which each poses the critical question to the Court. Respondent rephrases the question to read:

WHETHER THERE IS A DENIAL OF DUE PROCESS IN A CONVICTION FOR FORGERY WHERE THE "STANDARDS" FOR COMPARISON USED ARE PROVED TO BE THE HANDWRITING OF THE DEFENDANT TO THE SATISFACTION OF THE TRIAL COURT?

It is respectfully urged, however, that the question is not whether the trial court found that the "standards" for comparison were proven to the satisfaction of the trial court to have been written by the Defendant but whether the trial court had the right to make that finding despite the absence of competent testimony to prove that the "standards" had been signed by Petitioner.

A comparison of the briefs filed in this case reflects the following additional facts. The federal statute cited by both Petitioner and Respondent requires that the exemplar be either admitted or proved to be the handwriting of the person charged with having committed the forgery.

The 1963 case cited by Petitioner, Strauss v. United States, 311 F.2d 926 (5th Cir.) discloses the existence of competent evidence to substantiate the genuineness of the exemplars. Dean v. United States, 246 F. 568 (5th Cir.) is a 1917 case where the court held that the nature of the documents and books to be used as the exemplars were such as would probably have been written by the Defendant. It is conceded that that case

would have persuasive authority in support of the position of the Respondent were it not for the other facts in this case.

Here the statute requires that the Court be satisfied as to the genuineness of the exemplars. It is not denied in Respondent's brief that there was no direct evidence of the identity of the writers of the documents to be used as standard. Thus, the Court could not be legally satisfied as to genuineness. The jury is only permitted to find one fact, that is, whether the opinion of the handwriting expert is believable beyond a reasonable doubt. The jury is not, however, permitted to determine whether the standards were genuine since that function under the statute is exclusively one to be determined by the Court.

Since the expert's opinion is based on standards, a vital question is the proof of the genuineness of the standards. When the Court finds the standards genuine, the jury is practically told that the case has been made. The proof of the forged document's author is opinion. The proof of the genuineness of the standards must not be opinion, conjecture or assumption. It must be direct, especially where, as here, direct, clear evidence is available. Petitioner submits that the trial court could not find the exemplars genuine in the absence of direct evidence proving, not inferring, that fact.

It would seem that a fair trial would require the presentation to an expert of definitive evidence of a defendant's handwriting before the expert is permitted to give his opinion as to whether the questioned documents were written by the same hand. The weakness of expert testimony is well known. It is in fact an opinion. Here then the opinion of the expert is based upon the assumption that Petitioner wrote the standards because she probably wrote the standards. We therefore have an opinion based on an assumption. This is not consistent with due process.

CONCLUSION

It is respectfully submitted that Thompson v. Louisville, 362 U.S. 199 (1960) and Johnson v. Florida, ___U.S.___, 20 L.ed.2d 830 1968 require that all the elements of a criminal offense be proven. Here none were proven. Each was assumed. We urge the issuance of the writ so that the entire record may be reviewed.

MILTON E. GRUSMARK
1674 Meridian Avenue
Miami Beach, Florida
Attorney for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N. W. 12th Avenue, Miami, Florida, this _____ day of November, 1968.

Milton E. Grusmark